a new grant upon a resurvey of his lands. In proceedings on the caveat, there was a judgment for caveatee, and the caveator brings error. Affirmed.

Jos. A. Glasgow, of Staunton, and *John M. Colaw,* of Monterey, for plaintiff in error.

Curry & Curry and *Timberlake & Nelson,* all of Staunton, and *Andrew L. Jones,* of Monterey, for defendant in error.

HUMMER et al. *v.* COMMONWEALTH.

Nov. 15, 1917.

[94 S. E. 157.]

1. **Criminal Law (§ 814 (1)*)—Instructions—Applicability.**—Defendants were indicted on the charge of having unlawfully and feloniously cut and wounded another. Code 1904, § 3671, declaring that, if any person shall maliciously cut or wound another with intent to maim, etc., he shall be punished, etc., and that if the act be done unlawfully, but not maliciously, the offender shall be subject to a less punishment, was read by the clerk to the jury, and requested instructions that defendants could not be found guilty of malicious cutting were refused. Held, that the reading of the entire section, part of which was inapplicable to the offense with which defendants were charged, was error.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 717.]

2. **Criminal Law (§ 1172 (9)*)—Appeal—Harmless Error.**—As the jury did not assess the minimum punishment for unlawful and felonious assault, the reading of Code 1904, § 3671, which mentioned a greater punishment, must be deemed prejudicial error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

Error to Circuit Court, Clarke County.

Jeff Hummer and Weita Costello were separately indicted, but jointly tried, on the charge of having unlawfully and feloniously cut and wounded another. There were judgments of conviction, and defendants bring error. Reversed and remanded.

Marshall McCormick, of Berryville, for plaintiffs in error.

The Attorney General, for the Commonwealth.

VIRGINIA PORTLAND CEMENT CO. *v.* SWISHER'S ADM'R.

Nov. 15, 1917.

[94 S. E. 159.]

1. **New Trial (§ 71*)—Verdict Contrary to Evidence—Conflicting Evidence.**—On motion to set aside the verdict as contrary to the

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

evidence, the trial court cannot undertake to substitute its judgment for that of the jury, even where it thinks the judgment is not sustained by the weight of the evidence, if there be any serious conflict in it.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 459.]

2. Trial (§ 295 (7)*)—Instructions—Construction as Whole.—In an action for death of a servant, where the court instructed that the jury were not to find for plaintiff if they believed from the evidence that the accident occurred through any risk assumed, etc., and that such instruction was to be read in connection with preceding instructions as to the master's duty to exercise ordinary care to provide a reasonably safe place to work, etc., such instructions, thus referred to, were not erroneous, as failing to note the doctrine of assumed risk.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 743.]

3. Trial (§ 295 (6)*)—Instructions—Construction as Whole.—An instruction that if the jury believed from the evidence that the death was due to a defective step, and that the master, as defined in previous instructions referred to, had or should have had knowledge thereof, the master was liable, was not erroneous, as omitting a qualification as to ordinary care, in view of the preceding instructions, specifically directed to be read in connection with it, which told the jury that the master was only required to exercise ordinary care.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 743.]

4. Master and Servant (§ 235 (7)*)—Safe Place to Work—Obligation of Servant to Inspect.—The employee of a Portland cement company and the cement company itself were not under the same duty to discover a defect in a step used by the employee; it being the company's duty to inspect the steps, while the employee had a right to assume that such duty had been performed, and not unless the defect was obvious was he chargeable with negligence in failing to report it, or chargeable with any assumption of risk.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 696, 709.]

5. Master and Servant (§ 233 (2)*)—Injuries to Servant—Safe Place to Work—Steps.—An employee, who uses steps, may assume that all parts of them are safe, and is not required to walk in the middle of them.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 714.]

6. Trial (§ 267 (3)*)—Instructions—Application of Doctrine to Particular Fact.—In an action for death of a servant, caused by a fall from a defective stair, the court properly struck, as unnecessary and misleading, from an instruction which contained a full statement of the law applicable to the safe place to work phase of the case, the

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words "including the lack of railing at the point in question"; it being unnecessary to say that the law of safe place to work, in addition to its general application, was applicable to some particular fact.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 709.]

7. Master and Servant (§ 295 (9)*)—Injuries to Servant—Instruction—Assumption of Risk.—In an action for death of a servant through a fall from a stairway without a railing, on account of a loose, unnailed step, an instruction that, when the servant continued to work after protesting the absence of a railing, so far as danger incident to the absence of railing was concerned, he continued to work at his own peril, went as far as the court could go on the master's theory as to the railing.

[Ed. Note.—For other cases, see 15 Va.-W. Va. Enc. Dig. 661; 16 Va.-W. Va. Enc. Dig. 877.]

8. Master and Servant (§ 288 (15)*)—Injuries to Servant—Assumption of Risk.—Where, in reply to a servant's inquiry as to when the employer was going to fix the banister and walkways, so a man would be safe in getting around, the employer's mill foreman replied, "just as soon as we can get to them," and directed the servant to go ahead, the servant, in continuing with his work and using the stairway, did not, as a matter of law, assume all the risks incident to the lack of railing at the point where he fell from a loose unnailed step, and under the evidence such question was for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

9. Master and Servant (§ 289 (4)*)—Contributory Negligence—Question for Jury.—In an action for death of servant through a fall from a stairway, whether the servant exercised due care in remaining in service, relying upon the master's promise to provide a handrail, held for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

Error to Circuit Court, Augusta County.

Action by W. H. Swisher's administrator against the Virginia Portland Cement Company. To review a judgment for plaintiff, defendant brings error. Judgment affirmed.

A. C. Gordon and *D. Lawrence Groner,* both of Staunton, for plaintiff in error.

Curry & Curry and *Timberlake & Nelson,* all of Staunton, for defendant in error.

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